

Nicoletti Hornig & Sweeney

WALL STREET PLAZA
88 PINE STREET
SEVENTH FLOOR
NEW YORK, NY 10005-1801
TELEPHONE 212-220-3830
TELECOPIER 212-220-3780
E-MAIL: general@nicolettihornig.com
WEBSITE: www.nicolettihornig.com

MICHAEL MARKS COHEN
OF COUNSEL

NEW JERSEY OFFICE:
505 MAIN STREET, SUITE 218
HACKENSACK, NEW JERSEY 07601-5928
TELEPHONE 201-343-0970
TELECOPIER 201-343-5882

JOHN A.V. NICOLETTI
JAMES F. SWEENEY
DAVID R. HORNIG *
FRANK M. MARCIGLIANO
MICHAEL J. CARCICH
BARBARA A. SHEEHAN
NOOSHIN NAMAZI †
ROBERT A. NOVAK
TERRY L. STOLTZ
MICHAEL F. MCGOWAN
VINCENT A. SUBA
SAMUEL C. COLUZZI †
GUERRIC S.D.L. RUSSELL †
LINDA D. LIN ◊

VAL WAMSER †
KEVIN J.B. O'MALLEY
WILLIAM M. FENNELL
SCOTT D. CLAUSEN †
FARA N. KITTON †
JAMES E. MORRIS Δ†
DAVID E. SIGMON †
NORA A. VALENZA-FROST †
JEFFREY BINKLEY

August 11, 2011

* ALSO ADMITTED IN TEXAS
† ALSO ADMITTED IN NEW JERSEY
◊ ALSO ADMITTED IN CALIFORNIA
Δ ALSO ADMITTED IN MARYLAND

VIA ECF FILING

Honorable William D. Wall
United States Magistrate Judge
United States District Court
Eastern District of New York
United States Federal Courthouse
Central Islip, New York 11722

RE: *IN THE MATTER OF THE PETITION OF
FRED LEVINE, AS OWNER OF A 1991
37 FOOT LEGEND SAILING VESSEL, FOR
EXONERATION FROM AND LIMITATION
OF LIABILITY*
United States District Court
Eastern District of New York
Docket No. : 09 cv 5363 (LDW)(WDW)
Our File No. : 25000067 GSR

Dear Judge Wall:

This firm represents the plaintiff/petitioner Fred Levine in the above-referenced action. We write in response to Mr. Hansen's letter to the Court dated August 9, 2011.

Pursuant to the Court's Order dated June 23, 2011, petitioner's medical expert, Dr. Edmund Stewart, examined claimant Spahr on July 7, 2011. This office disclosed Dr. Stewart's report 11 days later after it was received by this office so it could be

VIA ECF FILING

Honorable William D. Wall

August 11, 2011

Page 2

reviewed by all parties in advance of the settlement conference.¹ Thereafter, a formal expert disclosure was produced to all parties.

Rather than approach counsel to schedule the deposition of petitioner's disclosed expert, Mr. Hansen subpoenaed Dr. Stewart to testify and produce his files on the unilaterally selected date of August 29, 2011. Mr. Hansen also tendered a check in the amount of \$64 for Dr. Stewart's time.

As the e-mail correspondence between the undersigned and Mr. Hansen clearly shows (See, Docket No. 26-4), this office has never taken the position that Mr. Hansen is not permitted to conduct expert discovery. In fact, we proposed reasonable steps to allow that discovery to proceed. The dispute now raised by Mr. Hansen is simply misguided.

First, it is clear that Mr. Hansen is not aware of the revisions to Rule 26 of the Federal Rules of Civil Procedure. Specifically, Rule 26 states:

(4) Trial Preparation: Experts.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

¹ The settlement conference ultimately did not proceed because Mr. Hansen was not prepared and had failed to comply with the Court's Order to submit an *ex parte* position statement.

VIA ECF FILING

Honorable William D. Wall

August 11, 2011

Page 3

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Contrary to Mr. Hansen's representation to the Court, this office has not refused to produce Dr. Stewart's file. However, petitioner has the right, to the extent necessary, to withhold any documents from production that are deemed protected under Rule 26(b)(4)(B) and (C). Mr. Hansen's demand for production of these protected documents is simply inconsistent with the revisions to the rule.

Furthermore, Mr. Hansen's view on what is a reasonable fee (i.e. \$64) for Dr. Stewart's time is absurd. As set forth in petitioner's expert disclosures, Dr. Stewart charges a flat fee of \$6,000 per day for his deposition testimony. I am advised that his fee is based on the fact that he must clear his calendar from seeing any patients that day to make time for the deposition. It is hard to believe that Mr. Hansen has an issue with this amount considering that his own medical experts charge at least as much, if not more, to appear for deposition: Dr. John Feder (\$6,000 per half day and \$10,000 for full day), Dr. Peter J. Ajemian (\$6,000 per half day and \$10,000 for full day), Dr. Joseph Larsen (\$5,000 per half day and \$10,000 for full day).² See, Exhibit "1".

Finally, Mr. Hansen was advised that Dr. Stewart is unavailable on August 29, 2011 for deposition. The undersigned is also unavailable that day. We are in the process of obtaining available dates from Dr. Stewart. Curiously, Mr. Hansen previously advised all parties that he would be unavailable and on vacation from August 22 to September 6. See, Exhibit "2". It is therefore unclear why Mr. Hansen is hell bent to bully Dr. Stewart to appear for deposition on the 29th, but in light of this information it would appear that his motives are disingenuous.

We thank the Court for its time and consideration to this matter.

Respectfully submitted,

NICOLETTI HORNIG & SWEENEY

By:


Gueric S.D.L. Russell

GSR/s/rr
Attachments

² Petitioner will be moving to preclude claimant Spahr's experts (liability and medical) because they were only disclosed on the day the joint pre-trial order was filed in violation of the Court's scheduling order.

VIA ECF FILING

Honorable William D. Wall

August 11, 2011

Page 4

cc:

VIA ECF

Michael E. Stern, Esq.

RUBIN FIORELLA & FRIEDMAN LLP

Attorneys for Henry Korn

292 Madison Avenue

New York, New York 10017

212-953-2381

Your File No.: 713-14251

VIA ECF

Daniel J. Hansen, Esq.

Attorneys for John Spahr

Woolworth Building

233 Broadway, 5th Floor

New York, New York 10279

212-697-3701

EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN THE MATTER OF THE PETITION OF
FRED LEVINE, AS OWNER OF A 1991 Docket No.: 09cv5363 (LDW) (WDW)
37 FOOT LEGEND SAILING VESSEL,
FOR EXONERATION FROM AND EXPERT WITNESS EXCHANGE
LIMITATION OF LIABILITY,

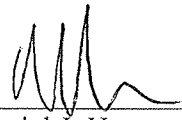
-----X

PLEASE TAKE NOTICE, that as and for the plaintiff's response to the demands
of the defendants, set forth the following:

The plaintiff may call John Feder, MD, 36 Lincoln Avenue, Rockville Centre,
New York 11570, as an expert witness at the time of trial. Dr. Feder's hospital
affiliations include South Nassau Communities Hospital, Oceanside, NY, Long Island
Jewish Medical Center, New Hyde Park, NY, North Shore University Hospital,
Manhasset, NY; his professional affiliations include Alpha Omega Alpha Medical Honor
Society, American Academy of Orthopedic Surgeons, American Orthopedic Foot and
Ankle Society, Medical Society of the State of New York, Nassau County Medical
Society, and the Suffolk County Medical Society. His medical education includes
graduating from New York Medical College, Valhalla, NY, 1987, post graduate training
includes general surgery, New York Hospital/Cornell Medical Center, New York, 1987 –
1989, orthopedic surgery, Montefiore Medical Center/Albert Einstein College of
Medicine, 1990 – 1994, a fellowship in Foot and Ankle Surgery, Junior Associate
Attending, Hospital for Special Surgery and Roosevelt Hospital, New York, 1994 - 1995.
Dr. Feder's expected fee for trial or other testimony is \$6,000 per half day and \$10,000
for the full day, with a total fee determined after testimony based upon time spent at trial
or other testimony. Reports authored by Dr. Feder setting forth a statement of the

opinions to be expressed and the basis of the and reasons therefor and the data and the and other information considered by the expert in forming the opinions, as well as a listing of cases in which the expert has testified in the past four years, were previously provided. Dr. Feder may have testified in the following cases in the past four years: 1. Rosa Guevara v. Frymaster, LLC, United States District Court, E.D. New York., No. CV-06 4799, Lester B. White Jr. v. Maxine G. Shurgin, Supreme Court, Nassau County, No. 15890/02, and Patrick & Kathy Donovan v. City of New York, Supreme Court, Kings County, No. 26462/05 2009. Dr. Feder has not authored any publications in the past ten years.

Dated: New York, New York
July 28, 2011



Daniel J. Hansen, Esq.
Attorney for Claimant John Spahr
767 Third Avenue, 24th Floor
New York, New York 10017
(212) 697-3701

To: Nicoletti Horning & Sweeney
Attorneys for Petitioner Levine
88 Pine Street, Seventh Floor
New York 10005

Rubin Fiorella & Friedman
Attorneys for Respondent Korn
292 Madison Avenue
New York, NY 10017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN THE MATTER OF THE PETITION OF
FRED LEVINE, AS OWNER OF A 1991 Docket No.: 09cv5363 (LDW) (WDW)
37 FOOT LEGEND SAILING VESSEL,
FOR EXONERATION FROM AND EXPERT WITNESS EXCHANGE
LIMITATION OF LIABILITY,

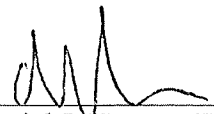
-----X

PLEASE TAKE NOTICE, that as and for the plaintiff's response to the demands
of the defendants, set forth the following:

The plaintiff may call Peter J. Ajemian, MD, 2809A Grand Avenue, Baldwin, NY 11510, as an expert witness at the time of trial. Dr. Ajemian graduated from NY Medical College in 1976, was and intern and resident at Lenox Hill Hospital graduating in 1981, is a Diplomat in the American Board of Orthopaedic Surgery, A Fellow of the Academy of Orthopaedic Surgeons, a Fellow of the American College of Surgeons, and is a physician duly licensed in the State of New York. Dr. Ajemian's expected fee for trial or other testimony is \$6,000 per half day and \$10,000 for the full day, with a total fee determined after testimony based upon time spent at trial or other testimony. Reports authored by Dr. Ajemian setting forth a statement of the opinions to be expressed and the basis of the and reasons therefor and the data and the and other information considered by the expert in forming the opinions, as well as a listing of cases in which the expert has testified in the past four years, were previously provided. Dr. Ajemian may have testified in the following cases in the past four years: Joan McKinnon Bryce v. Peter Valentino Kathy Stillo, Supreme Court, Queens County, Indexc No. 30278/08, Robert S. Dallek v. Joseph M. Meade and Joseph Meade Jr., Supreme Court, Suffolk County, Index No. 18706/04, and Catherine Dounias and Peter Dounias v. Flowers by Marianne, Inc., Jamie

Zucker, Lorenzo Jarrett and Reiss Wholesale Hardware Co. Inc., Supreme Court, Kings County, Index No. 22049/06 2008. Dr. Ajemian has not authored any publications in the past ten years.

Dated: New York, New York
July 28, 2011



Daniel J. Hansen, Esq.
Attorney for Claimant John Spahr
767 Third Avenue, 24th Floor
New York, New York 10017
(212) 697-3701

To: Nicoletti Horning & Sweeney
Attorneys for Petitioner Levine
88 Pine Street, Seventh Floor
New York 10005

Rubin Fiorella & Friedman
Attorneys for Respondent Korn
292 Madison Avenue
New York, NY 10017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

IN THE MATTER OF THE PETITION OF
FRED LEVINE, AS OWNER OF A 1991 Docket No.: 09cv5363 (LDW) (WDW)
37 FOOT LEGEND SAILING VESSEL,
FOR EXONERATION FROM AND EXPERT WITNESS EXCHANGE
LIMITATION OF LIABILITY,

-----X

PLEASE TAKE NOTICE, that as and for the plaintiff's response to the demands
of the defendants, set forth the following:

The plaintiff may call Joseph Larsen, D.P.M., D.A.B.P.S, 2419 Jericho Turnpike,
Garden City Park, NY 11040. Dr. Larsen attended undergraduate school at Hofstra
University, where he received a Science Bachelor Degree in Biology. He graduated New
York College of Podiatric Medicine, followed by a two year residency in foot surgery.
Dr. Larsen received a DPM degree at the New York College of Podiatric Medicine and
finished his two year residency at the VA Medical Center in Northport, New York where
he was Chief Resident. Dr. Larsen is a board certified Foot Surgeon by the American
College of Foot and Ankle Surgeons. He is an active member and Diplomat of the
American College of Foot and Ankle Surgeons. He is also an active member of the
American Podiatric Medical Association. Dr. Larsen is on staff at Long Island Jewish
Medical Center, Northshore University Hospital, St. Francis Hospital in Roslyn and
Gramercy Park Surgical Center. Dr. Larsen's expected fee for trial or other testimony is
\$5,000 per half day and \$10,000 for the full day, with a total fee determined after
testimony based upon time spent at trial or other testimony. Reports authored by Dr.
Larsen setting forth a statement of the opinions to be expressed and the basis of the and
reasons therefor and the data and the and other information considered by the expert in

forming the opinions, as well as a listing of cases in which the expert has testified in the past four years, were previously provided. Dr. Larsen has not authored any publications in the past ten years.

Dated: New York, New York
July 28, 2011



Daniel J. Hansen, Esq.
Attorney for Claimant John Spahr
767 Third Avenue, 24th Floor
New York, New York 10017
(212) 697-3701

To: Nicoletti Horning & Sweeney
Attorneys for Petitioner Levine
88 Pine Street, Seventh Floor
New York 10005

Rubin Fiorella & Friedman
Attorneys for Respondent Korn
292 Madison Avenue
New York, NY 10017

EXHIBIT 2

EXHIBIT 2

EXHIBIT 2

Guerric Russell

From: daniel hansen [danieljhansen@gmail.com]

Sent: Tuesday, August 09, 2011 6:33 PM

To: Michael Stern

Cc: Guerric Russell

Subject: Re: FW: Summary of ECF Activity

No objection from me. I am away on vacation from August 22 to September 6th, however. Please also first provide me proposed dates to avoid any scheduling conflicts.

Dan

On Tue, Aug 9, 2011 at 9:52 AM, Michael Stern <MStern@rubinfoirella.com> wrote:

Gents,

I have a serious scheduling conflict for August 16. Would you both okay my seeking an adjournment of this conference?

Unless, of course, you both agree to let me go before then ☺

Michael E. Stern, Esq.

RUBIN, FIORELLA & FRIEDMAN LLP

292 Madison Avenue, 11th Floor

New York, NY 10017

(212) 953-2381

(212) 953-2462 (fax)

(212) 447-4615 (direct dial)

(646) 321-2118 (mobile)

From: ecf_bounces@nyed.uscourts.gov [mailto:ecf_bounces@nyed.uscourts.gov]

Sent: Tuesday, August 09, 2011 12:04 AM

To: nobody@nyed.uscourts.gov

Subject: Summary of ECF Activity

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*** NOTE TO PUBLIC ACCESS USERS ***

8/10/2011

This Daily Summary Report may contain documents for which one or more of the following policies apply:

Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

There is no charge for viewing opinions.

Activity has occurred in the following cases:

2:09-cv-05363-LDW-WDW In the Matter of the Petition of Fred Levine, as Owner of a 1991 37 Foot Legend Sailing Vessel, for Exoneration from and Limitation of Liability v. Spahr
Notice of Hearing

Docket Text:

NOTICE of Hearing: Pretrial Conference set for 8/16/2011 11:00 AM in Courtroom 940 before Senior Judge Leonard D. Wexler. (Kharjie, Josiah)

DISCLAIMER: The information contained in this communication may be confidential, is intended only for the use of the recipient named above, and may be legally privileged. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please re-send this communication to the sender and delete the original message and any copy of its from your computer system. Thank you.

--

Daniel J. Hansen
Attorney at Law
767 Third Avenue, 27th Floor
New York, NY 10017
Tel. (212) 697-3701
Fax. (212) 918-9197